Supreme Court, U.S.
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No.
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IN THE
Supreme Court of the United States

JOHN BURTON and FELIX BURTON,
Petitioners,

v.

NICOLAS CHARLES, CHARITE ASSEIGNE,
MIGUEL AUBOUT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

John and Felix Burton retained the services of a farm labor contractor to provide workers to harvest their snap bean crop. While being transported to the Burton Farm, the truck in which the workers were riding, overturned, killing three and seriously injuring numerous other workers. Applying the relevant factors in considering whether the Burtons were joint employers under the Migrant and Seasonal Agricultural Workers Protection Act (hereinafter "AWPA"), the District Court held that the Burtons were not joint employers so as to impose liability under the AWPA. Applying the 1997 revised code of regulations, the court of appeals reversed, deciding that the Burtons were joint employers and, therefore, liable for the injured workers' actual damages.

Question 1:

Whether the revised code of federal regulations under the AWPA, as applied by the court of appeals, imposes a strict liability standard on farmers who utilize farm labor contractors to obtain workers, contrary to Congressional intent.

Question 2:

Whether a farmer who fails to verify that a farm labor contractor possesses a valid certificate of registration is strictly liable for violation of the AWPA provisions which are only applicable to agricultural employers for actual damages that may be sustained by the workers.

LIST OF PARTIES

The parties to the consolidated proceedings below were Petitioners, John and Felix Burton, and Bobby Hall, Jr. and Little Rock Produce Company, Inc., as Defendants. Nicolas Charles, Charite Asseigne, Miguel Aubout, Samson Germain, Marcel Jean-Baptiste, Alexandre Joseph, Marcel Joseph, Edner Philippe, Fito Pierre, Frankel Pierre, Fatami "Rita" Saint Fleur, Gerard Simeon, Lavius Dit Servius Vil and Jean Jacques Vytelle, Individually, and Avelie Maissoneuve, as Personal Representative for the Estate of Jean J. Maissoneuve, Deceased, are the Respondents.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 169 F.3d 1322 (11th Cir. 1999).[1] The district court's opinion finding that the Burtons were not the joint employers of the workers (Pet. App. 2a) is reported at 857 F. Supp. 1574 (M.D. Ga. 1994). The district court's opinion holding that the Burtons were not liable to the workers for actual damages based on the Burtons' failure to verify the farm labor contractor's certificate of registration (Pet. App. 3a) is unreported. The district court's opinion assessing statutory damages against the Burtons based on their failure to verify the certificate of registration of the farm labor contractor (Pet. App. 4a) is unreported.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1985). The opinion and judgment of the court of appeals was entered on March 12, 1999. As required by 28 U.S.C. § 2101(c) (1985) and Rule 20.4, Supreme Court Rules, this petition has been filed within ninety (90) days of the denial of rehearing entered by the Eleventh Circuit on May 26, 1999 (Pet. App. 5a).

STATUTORY PROVISIONS

The Agricultural Workers Protection Act (hereinafter "AWPA") was enacted in 1983, that placed affirmative duties on agricultural employers to assure protections for migrant and seasonal agricultural workers in, among others, the safe transportation of workers to and from the work site. 29 U.S.C. § 1841(b) (Pet. App. 61a-62a). The AWPA defines an agricultural employer as one who owns or operates "a farm, ranch, processing establish-

[1] "Pet. App." references are to the appendix to this petition.

ment, cannery, fin, packing shed or nursery . . . and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal worker." 29 U.S.C. § 1802(2) (Pet. App. 61a).

While affirmative duties to ensure safe housing, safe transportation, and wage and payroll records are placed on "agricultural employers" under the AWPA, 29 U.S.C. § 1842 requires any person who utilizes the services of a farm labor contractor to verify that the farm labor contractor has a valid certificate of registration (Pet. App. 62a). In its discretion, the district court may award actual or statutory damages for violations of the AWPA. 29 U.S.C. § 1854 (Pet. App. 62a).

STATEMENT OF THE CASE

The court of appeals, applying the revised code of federal regulations adopted in 1997 to the facts of this case, overturned the district court's determination that the Burtons were not the joint employers of the workers (Pet. App. 25a). In so holding, the court of appeals decided contrary to its own prior rulings in similar cases (as succinctly pointed out in Senior Circuit Judge Roney's dissenting opinion), which have decided the "joint employer" issue. The court of appeals' analysis of the joint employer issue, in light of the revised regulations, imposes a standard of strict liability on farmers who utilize the services of a farm labor contractor to obtain workers to harvest their crop, which is in direct contravention of Congressional intent. Additionally, contrary to the ruling of the district court, the court of appeals decided that a farmer who fails to verify the certificate of registration of the farm labor contractor is liable for actual damages sustained by the workers, notwithstanding the fact that the farmer is not an "agricultural employer" within the meaning of AWPA (Pet. App. 25a). The ruling runs contrary to Congressional intent in enacting the AWPA

that only "agricultural employers" be liable for actual damages for a breach of the duties imposed on agricultural employers by the AWPA.

The Burtons' Farming Operation

John and Felix Burton are the owners and operators of a 200-acre farm outside the small town of Barney in southwest Georgia. The Burtons are row crop farmers principally growing cotton, corn, soybeans and peanuts. In 1990, the Burtons decided to plant green beans and cucumbers in addition to their main crops (Pet. App. 2a, 33a-34a). The Burtons contacted the Georgia Department of Labor to secure workers to harvest their bean crop. The Department of Labor put the Burtons in contact with Wilner Luxama, a farm labor contractor, who provided the Burtons with a crew to harvest the 1990 crops. Because the harvest took place too late in the season, the beans were unmarketable and Luxama's crew only worked one-half day harvesting beans (Pet. App. 3a, 34a).

The following year, Luxama and a crew of workers returned to the Burton farm to harvest the 1991 bean crop (Pet. App. 3a, 34a). During each day of the harvest, Luxama and members of his crew would transport the workers from their temporary housing in Ashburn, Georgia to the Burtons' farm. Upon arriving at the farm, the Burtons would inform Luxama which field was ready to be harvested (Pet. App. 3a, 34a).[2] Luxama and his crew would then go to the bean field where Luxama would assign duties to specific workers and direct and supervise the details of the harvest. Although not involved in the

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[2] In the production of snap beans, fields are planted approximately a week apart so that the beans will not ripen at the same time and can be harvested while still marketable. Each field is harvested in the order in which it was planted (R6-104-34, 40-41, 62, 64, 67, 131).

direct supervision of the harvest, the Burtons occasionally checked on the progress of the harvest (Pet. App. 3a, 34a-35a).

The Burtons compensated Luxama by paying a negotiated price for each box of beans harvested. Each crewmember would receive a ticket for each box of beans picked. Luxama would pay each worker a set price for each ticket (Pet. App. 3a, 35a). The boxes of beans would then be loaded onto trailers and transported to the packing shed for sale (Pet. App. 3a-4a, 35a). A broker at the packing shed would examine the beans and determine if the beans were marketable. If the beans had grown too large to be marketable, the Burtons were informed and the workers would be told to stop picking the field (Pet. App. 35a).

The Accident

Although the Burtons failed to make a profit on their 1990 and 1991 bean crops, the Burtons again grew snap beans in 1992. Luxama brought a crew to the Burtons' farm to harvest the 1992 crop. On June 3, 1992, the pick-up truck in which the workers were being transported from Ashburn overturned killing three and seriously injuring numerous other workers (Pet. App. 4a, 5a, 36a).[3]

The District Court's Rulings

On March 2, 1994, the district court conducted an evidentiary hearing to determine if the provisions of the AWPA were applicable to the named defendants (Pet. App. 33a). After consideration of the record, the text of the AWPA, the legislative history and federal regulations, the district court held that the Burtons, as well as

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[3] A station wagon that was being used to transport the workers to the Burton farm had broken down and was in a service garage for repair. The pick-up truck in which the workers were riding on the day of the accident had been loaned to Luxama by a mechanic at the service garage (R2-94-11, 38).

the other defendants, were not "agricultural employers" within the meaning of the AWPA, and, therefore, not liable under the motor vehicle safety provisions of the AWPA for the plaintiffs' injuries which resulted from the motor vehicle accident (Pet. App. 48a).

Considering the factors outlined in *Hodgson v. Griffin and Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir. 1973) as well as additional factors deemed relevant to a joint-employer analysis as outlined in *Aimable v. Long & Scott Farms*, 20 F.3d 434 (11th Cir. 1994), the district court determined that the Burtons, although directing which fields were ready to harvest, "maintained no control over the manner in which the beans were picked" (Pet. App. 43a-44a). The district court rejected the plaintiffs' argument that the Burtons maintained a significant degree of control over the workers in making decisions regarding planting, irrigation and cultivation of the crops. Recognizing the realities of agricultural employment, the district court held that evidence of control "must mean something more than simply a restatement of the farmer's role in agriculture" (Pet. App. 42a-43a). As the court noted, a farmer "will almost always be responsible for decisions concerning the planting, irrigating, cultivation, application of pesticides and herbicides and the sale and marketing of the crops" (Pet. App. 43a). Adopting a definition of control espoused in *Donovan v. Brandel*, 736 F.2d 1114 (6th Cir. 1984), the district court held that the nature and degree of control over the workers is not evidenced by the farmer's decisions in the production, cultivation and sale of the crops but whether the farmer retains "the right to dictate the manner in which the details of the harvesting function are executed" (Pet. App. 43a).

The district court's rejection of plaintiffs' argument that the nature and degree of control over the workers is shown by the farmers' decisions regarding the planting,

irrigating and cultivating of the crops was in accord with the recent Eleventh Circuit Court opinion in *Aimable v. Long & Scott Farms,* 20 F.3d at 434, which held:

> Although at first glance, the . . . factor may appear to encompass abstract notions of control . . . . We believe that Long & Scott's agricultural decisions—decisions which only indirectly affected the number of workers necessary to harvest the land—can not be likened to "control" in the FLSA/MSAWPA sense . . . . It is not surprising that Long & Scott would (and, despite FLSA/MSAWPA, should be able to) give general instruction to Miller as to which crops to harvest at a particular time . . . . Control arises . . . when the farmer goes beyond general instructions, such as how many acres to pick in a given day, and begins to assign specific tasks, to assign specific workers, or to take an overly active role in the oversight of the work. *Aimable v. Long & Scott Farms,* 20 F.3d at 440-441.

The district court further determined from the record that while the Burtons periodically checked on the progress of the harvest, Luxama was primarily responsible for supervising the workers. Again citing the decision of *Aimable v. Long & Scott Farms,* the district court determined that the Burtons' "infrequent assertions of minimal oversight . . . do not rise to the level of supervision necessary" to support a finding of a joint employer relationship (Pet. App. 44a).

In considering the other relevant factors in the joint employment analysis, the district court determined that the Burtons did not have the power to determine pay rates or the method of payment of the workers, did not have the right to hire or fire the workers or modify their employment conditions, or have any responsibility for the payment of the workers' wages or the preparation of payroll (Pet. App. 44a-46a). The district court did find two

factors that supported a finding of joint employment, which included that the Burtons owned the property upon which the harvest was conducted, and that the workers performed a specialty job integral to the production of the Burtons' snap bean crop (Pet. App. 47a).

After analyzing the factors relevant to the joint employment issue, the district court concluded that the Burtons did not "employ" the plaintiffs within the meaning of the AWPA and the FLSA. After reviewing the record and the testimony, the district court found:

> . . . that the Burtons retained no direct control over the work of the harvesters, exercised only cursory supervision over the harvest, did not determine the workers' pay rate or the method of payment, did not have the authority to hire or fire the individual crew members, could not modify the employment conditions of the individual workers, did not pay the workers, and were not responsible for the preparation of a payroll (Pet. App. 47a).

The district court declined the plaintiffs' invitation to "look beyond the significance of any particular factor" and hold that because the workers were ultimately economically dependent on the farmers who grew the crops, a joint employment relationship should be found (Pet. App. 47a). In reviewing the legislative history of the AWPA, the district court recognized "that there will be situations in which a farmer is not held to be the joint employer of a farm labor contractor's employees." In rejecting the "economic reality" test advanced by the plaintiffs, the court stated: "an economic reality test that sweeps as broad as plaintiffs suggest is no test at all; it is a mere formality" (Pet. App. 48a).

After the district court held that the Burtons were not the joint employer of the workers, the Burtons filed a motion for summary judgment on plaintiffs' remaining

claim under the AWPA based on the Burtons' failure to verify that Luxama possessed a valid certificate of registration as required under 29 U.S.C. § 1842. The Burtons contended that actual damages for the plaintiffs' injuries were not recoverable but only statutory damages could be assessed for this technical violation. Construing the term actual damages synonymously with general damages, the district court concluded that the Burtons' failure to check Luxama's certificate of registration "is simply too far removed from the type of harm complained of for actual damages to be attributable to" the Burtons (Pet. App. 55a). In support of its conclusion that the Burtons were not liable to the plaintiffs for actual damages, the court found that the AWPA "clearly provides the court with the discretion to choose between imposition of actual and statutory damages" and that the legislative history did not adopt a strict liability standard to achieve its purposes (Pet. App. 55a). The district court held that statutory damages of up to $500.00 per plaintiff may be awarded (Pet. App. 56a).

On plaintiffs' motion for summary judgment to assess statutory damages against the Burtons for their violation of 29 U.S.C. § 1842, the district court found that, while the Burtons' violation of 29 U.S.C. § 1842 was technically intentional, the Burtons had not been guilty of any prior similar violations. The district court also determined that it was not unreasonable for the Burtons to assume that Luxama was qualified to provide a crew because Luxama had been referred to them by the State Department of Labor. Finding that the violation of 29 U.S.C. § 1842 was "not a knowing, willful and flagrant disregard of the law", the court, in exercising its discretion, awarded each plaintiff the sum of $350.00 as statutory damages (Pet. App. 57a-58a).

The 1997 US Department of Labor Revisions to the AWPA Regulations

Subsequent to the decisions of the district court, the Department of Labor (hereinafter "DOL") issued a final rule revising its regulations to the AWPA on March 12, 1997 (hereinafter the "Rule"). 29 C.F.R. § 500(h) (1997). The new Rule, which purports to provide new guidance in the analysis of whether a farm labor contractor is an independent contractor or a joint employer with the producer, identifies six factors for the courts to consider in the determination of the joint employer issue. 29 C.F.R. § 500.20(h)(4) (1997). For a determination to be made that a joint employer relationship does not exist, the Rule requires a "complete disassociation" between two or more persons with respect to the employment of a particular employee. 29 C.F.R. § 500.20(h)(5)(iii) (1997).

Prior to its adoption, the Rule met with stringent opposition from various groups including Agricultural Producers, American Farm Bureau Federation, California Grape and Tree Fruit League, Florida Fruit and Vegetable Association, Hood River Grower-Shipper Association, Maine Farm Bureau Association, Michigan Farm Bureau, Midwest Food Producers Association, National Cotton Ginners' Association, New England Apple Council, Nisei Farmers League, Pennsylvania Farm Bureau, United States Sugar Corporation, Venture County Agricultural Association, Virginia Farm Bureau Federation, Washington State Growers Clearing House Association, and the National Council of Agricultural Employers. These organizations and associations asserted that the new Rule would impose a strict liability joint employment standard for farmers and producers who utilize the services of a farm labor contractor to obtain labor to harvest their crops. 62 Fed. Reg. 11,734, 11,737 (1997). Despite this

strong opposition to the proposed Rule, the final Rule became effective on April 11, 1997.

The Court of Appeals Reversal

According significant weight to Department of Labor's 1997 revisions to the AWPA regulations, the Eleventh Circuit reversed the district court's determination that the Burtons did not "employ" the plaintiffs within the meaning of the AWPA (Pet. App. 21a). The court of appeals did not take issue with the district court's factual determinations but substituted its own analysis of the joint employer issue. This analysis included consideration of factors that had previously been deemed irrelevant by the courts when determining whether the farmer is a joint employer with the farm labor contractor prior to the adoption of the new Rule.

In analyzing whether the Burtons had the power to direct, control or supervise the workers, the court of appeals found, as did the district court, that the Burtons did not "tell Luxama when to commence picking each day and did not determine whether a specific worker should be disciplined" (Pet. App. 12a). The court of appeals also agreed with the district court that most of the direct supervision and oversight of the harvest was entrusted to Luxama (Pet. App. 13a). The court of appeals determined from the record, as did the district court, that the Burtons would monitor the progress of the harvest several times a day (Pet. App. 13a). However, in holding that the Burtons "exercised some aspects of control", the court of appeals relied on the facts that the Burtons "determined the particular fields they wanted the appellants to cultivate, determined when the appellants would begin picking each field and supplied appellants with boxes that Little Rock provided" (Pet. App. 12a). The court of appeals' reliance on the Burtons' agricultural decisions in the planting, harvesting, and

marketing of the bean crop to evidence control was in direct contradiction to the court's earlier decisions in *Aimable v. Long & Scott Farms*, 20 F.3d 434 (11th Cir. 1994) and *Antenor v. D & S Farms*, 88 F.3d 925 (11th Cir. 1996). To evidence the control factor to support a finding of joint employment, these prior Eleventh Circuit decisions required "specific indicia of control" rather than a mere restatement of the farmer's role in agriculture. Additionally, although recognizing that most of the direct supervision and oversight over the harvesting of the bean crop was entrusted to Luxama, the court of appeals held that the Burtons' monitoring the progress of the harvest was sufficient to show supervision of the workers to evidence a joint employment relationship (Pet. App. 13a). In so ruling, the court of appeals again departed from its decisions in *Aimable* and *Antenor*, which specifically authorized the Burtons to monitor the progress of the harvest without being considered the joint employer of the workers. *Aimable v. Long & Scott Farms*, 20 F.3d at 441-442; *Antenor v. D & S Farms*, 88 F.3d at 935.

The court of appeals agreed with the district court that the Burtons did not have control over Luxama's hiring decisions and that the Burtons did not exercise direct or indirect power to determine the workers' pay rates or the methods of payments, finding that Luxama controlled the rates of pay, how the workers received their pay and when they would be paid. (Pet. App. 14a-15a). However, in concluding that the Burtons had the power to modify the employment conditions or determine the pay rates of the workers, the court of appeals again relied on the Burtons' decisions regarding when the workers would begin picking the snap bean crop, which field would be picked and for how long (Pet. App. 15a). In finding evidence of control in the Burtons' decisions when to plant their snap bean crop, which field was ready

to be harvested and whether to stop the harvest because the beans had become unmarketable, the court of appeals was in direct contradiction to its prior rulings in *Aimable* and *Antenor* which held that a farmer's agricultural decisions in the production of his crop are not proper considerations in the joint employer analysis. *Aimable v. Long & Scott Farms,* 20 F.3d at 441; *Antenor v. D & S Farms,* 88 F.3d at 933.

The court of appeals also agreed with the district court's findings that the workers performed a line-job integral to the production of the Burtons' snap bean crop and that the work performed was on property owned by the Burtons, factors weighing in favor of a joint employment relationship (Pet. App. 18a-19a). The court of appeals then considered other factors contained in the new Rule, which the district court, and the decisions in *Aimable* and *Antenor,* considered irrelevant to the inquiry of whether the Burtons were the joint employers of the plaintiffs. These factors included the degree of permanency and duration of the relationship between the Burtons and the workers, which the court determined did not support a determination that the plaintiffs were economically dependent on the Burtons; that the work performed was a rote, unskilled task, which the court determined weighed in favor of the plaintiffs; and whether the Burtons undertook responsibilities in relation to the plaintiffs commonly performed by the employers, which the court found did not support a finding of economic dependence on the part of the plaintiffs (Pet. App. 15a-17a; 19a-20a).

By applying the new Rule and the Burtons' agricultural decisions in the planting, cultivating, marketing, and monitoring the progress of the snap bean harvest, the court of appeals found that the plaintiffs were economically dependant on the Burtons and, therefore, the Burtons

were joint employers of the workers and liable under the motor vehicle safety provisions contained in U.S.C. § 1841 (Pet. App. 61a-62a).

The court of appeals also reversed the district court's holding that the Burtons' failure to verify that Luxama possessed a valid certificate of registration could not be considered as the legal and proximate cause of the motor vehicle accident and plaintiffs' resulting injuries (Pet. App. 23a). The court of appeals' holding imposes strict liability on any person who utilizes the services of a farm labor contractor for violations of the provisions of the AWPA applicable only to agricultural employers, agricultural associations and farm labor contractors even though they are not agricultural employers within the meaning of the AWPA. This holding is contrary to Congressional intent that only agricultural employers, agricultural associations and farm labor contractors be held responsible for a breach of the duties imposed under the motor vehicle safety provisions of the AWPA. This ruling also removes the discretion of the trial court to assess statutory damages in lieu of actual damages in the event of unintentional and technical violations, contrary to the express terms of the AWPA.

Thus, the Eleventh Circuit concluded as a matter of law that the Burtons employed the plaintiffs within the meaning of the AWPA and were strictly liable to the plaintiffs for failing to verify Luxama's certificate of registration. The court of appeals remanded the case to the district court to consider only the issue of damages for the Burtons' failure to ensure that the vehicles transporting the plaintiffs carried insurance or a liability bond and damages for the Burtons' failure to verify Luxama's certificate of registration (Pet. App. 25a).

REASONS FOR GRANTING THE WRIT

I. THE 1997 REVISED CODE OF FEDERAL REGULATIONS UNDER THE AWPA, AS APPLIED BY THE ELEVENTH CIRCUIT, CREATES A STRICT LIABILITY STANDARD ON FARMERS WHO UTILIZE THE SERVICES OF A FARM LABOR CONTRACTOR IN DIRECT DEROGATION TO CONGRESSIONAL INTENT.

In enacting the AWPA, Congress intended to make its provisions applicable to agricultural employers through a joint employment analysis. However, Congress recognized that there would be situations in which a farmer would not be held as the joint employer of the farm labor contractor's employees. See H.R. Rep. No. 885, 97th Cong., 2d Sess. at 7; reprinted in 1982 U.S.C.C.A.N. 4547; *Charles v. Burton*, 857 F. Supp. 1574, 1581 (M.D. Ga. 1994). Recognizing the variety of employment relationships in the agricultural economy, Congress "believed that in some situations, holding a producer jointly liable would be unfair." Michael H. LeRoy, *Farm Labor Contractors and Agricultural Producers as Joint Employers Under the Migrant and Seasonal Agricultural Worker Protection Act: An Empirical Public Policy Analysis*, 19 Berkley J. Employment & Lab. L. 175, 180 (1998). However, in adopting the revised regulations in 1997 to create a broader standard to encourage enforcement of the AWPA, "the Rule effectively treats a producer as a farm labor contractor's joint employer *in all cases*." Michael H. LeRoy, *Farm Labor Contractors and Agricultural Producers as Joint Employers Under the Migrant and Seasonal Agricultural Worker Protection Act: An Empirical Public Policy Analysis*, 19 Berkley J. Employment & Lab. L. at 180. (Emphasis supplied.)

The legislative history of the AWPA evinces that, in adopting the new Rule, the Department of Labor has gone far beyond what Congress intended in advancing the joint employer doctrine under the AWPA. Specifically addressing the appropriate analysis to be used in deciding whether a farmer is a joint employer with the farm labor contractor where the farmer/producer asserts that the workers were the sole employees of the farm labor contractor, the Committee of Education and Labor stated, "it is the intent of the Committee that the formulation as set forth in *Hodgson v. Griffin and Brand of McAllen, Inc.*, 471 F.2d 235 (1973) be controlling." H.R. Rep. No. 97-885, 97th Cong., 2nd Sess. at 7 (1982); reprinted in 1982 U.S.C.C.A.N. 4547. The Fifth Circuit in *Hodgson* announced five factors to be considered in an analysis of the joint employer issue; (1) whether the work is performed on the premises of the company; (2) how much control does the company exert over the employees; (3) does the company have the power to fire, hire, or modify the employment condition of the employees; (4) do the employees perform a specialty job within the production line; and (5) may the employee refuse to work for the company or work for others. *Hodgson v. Griffin and Brand of McAllen, Inc.*, 471 F.2d at 237-238.

Based upon the congressional mandate that the analysis set forth in *Hodgson v. Griffin and Brand of McAllen, Inc., supra*, be utilized in the joint employer determination, the Department of Labor adopted five regulations to guide the courts in a determination of the joint employer issue:

A. The nature and degree of control of the workers;

B. The degree of supervision, direct or indirect, of the work;

C. The power to determine the pay rates or the methods of payment of the workers;

D. The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers;

E. Preparation of payroll and the payment of wages.

29 C.F.R. § 500.20(h)(4)(ii) (1983).

From a reading of *Hodgson v. Griffin and Brand of McAllen, Inc.*, and the initial regulations adopted by the DOL, it is clear that Congress only intended that a joint employer relationship be found when the farmer or grower takes an overly active role in controlling the details of the harvesting process, in supervising and overseeing the harvest, dictating the pay rate or the power to modify other conditions of employment of the workers. However, the DOL, in adopting the new Rule, has transcended congressional intent that, in some cases, a joint employer relationship should not be found. The DOL's new Rule has effectively fashioned a regulatory scheme where a joint employment relationship will be found in all cases.

To demonstrate how the DOL's new Rule creates a strict liability standard on farmers, the factors which were identified by the court of appeals as relevant to the joint employer determination under the new Rule, and the evidentiary basis applied by the court, is examined below.

A. Whether the Farmer Has the Power to Direct, Control or Supervise the Workers.

In analyzing this factor, the court of appeals agreed with the district court that the Burtons did not tell Luxama when to begin picking each day and did not determine whether a specific worker should be disciplined (Pet. App. 12a). In deciding that the Burtons exhibited *some aspects* of control, the court of appeals relied on the facts that the Burtons determined which field to harvest, when to begin picking each field and supplied the workers with

boxes (Pet. App.. 12a). Since it is only the farmer who knows which field was planted first and ready for harvest, the farmer must always direct the farm labor contractor to the appropriate field. Therefore, by holding that control is shown when a farmer directs the farm labor contractor to the field which is ready to harvest, the court of appeals' decision will result in this factor always weighing in favor of a finding of joint employment.

The second aspect of this factor the court of appeals analyzed was the degree of supervision over the workers. Although recognizing that the Burtons entrusted most of the direct supervision and oversight of the workers to Luxama, the court of appeals found that, because the Burtons instructed Luxama what fields to harvest and monitored the progress of the harvest several times per day, these facts were sufficient to find that the supervision factor weighed in favor of a joint employer relationship (Pet. App. 13a). As stated in the preceding paragraph, the farmer must tell the farm labor contractor what part of the crop is ready for harvest since he is the one who planted the crop. Additionally, it is inconceivable that a farmer will not periodically check on the progress of the harvest since his very livelihood is dependent on the crops he grows and getting them to market. By deciding that supervision is shown by directing the farm labor contractor to the field which is ready to be harvested and periodically checking on the progress of the harvest, the court of appeals' decision will result in this factor always weighing in favor of a finding of a joint employer relationship.

B. Whether the Farmer Has the Power to Hire, Fire, Modify Employment Conditions, Determine Pay Rates or the Method of Payment.

In analyzing this factor, the court of appeals agreed with the district court that Luxama controlled the workers'

pay rates, how they received payment and when they were paid (Pet. App. 14a). The court of appeals also found that the Burtons did not control Luxama's hiring decisions and did not modify the workers' employment conditions such as the number of hours the workers harvested (Pet. App. 15a). However, the court of appeals held that this factor weighed in favor of finding a joint employer relationship because the Burtons "ultimately decided when the workers would begin harvesting the snap bean crop, which fields to harvest and for how long" (Pet. App. 15a). How these facts indicate the Burtons' power to hire, fire, modify employment conditions or determine pay rates and methods of payment is unknown to this writer, but if such circumstances are used to support a finding of joint employment, this factor will always weigh against the farmer. When the workers begin the harvest is determined by when the farmer plants his seeds. Which field is ready to harvest is dependent on which field was planted first. Whether an entire field of snap beans is harvested is dependent on whether the remaining beans are of a size to be marketable. Every farmer must make these agricultural decisions of what time of year to plant his seeds, what part of his crop is ready to harvest and when to cease the harvest when the remaining crop cannot be sold. By utilizing these agricultural decisions (which must be made by every farmer) to evidence a farmer's power to hire, fire, modify employment conditions or determine pay rates or methods of payment, this factor will always weigh in favor of a finding of joint employment.

C. The Degree of Permanency and Duration of the Relationship Between the Parties.

The court of appeals considered this factor despite it not being included as part of the analysis in *Hodgson v. Griffin and Brand of McAllen, Inc.*, as well as this factor being determined irrelevant in the joint employer

analysis in *Aimable v. Long & Scott Farms* and *Anterior v. D & S Farms.* However, finding that the evidence of record did not establish that plaintiffs worked for the Burtons in years prior to 1992, the court of appeals held that this factor weighed against a finding of a joint employment relationship (Pet. App. 15a).

D. Whether the Services Performed Are a Repetitive, Rote, Unskilled Task.

Following the Eleventh Circuit's prior decision in *Aimable v. Long & Scott Farms,* the district court did not consider this factor in its analysis of the joint employment issue (Pet. App. 40a). In *Aimable,* the Eleventh Circuit determined that this factor, (which was not a regulatory factor under the old DOL Rule), was not relevant since it would only indicate that the workers were employees, but not helpful in determining if they were employees of the farm labor contractor, the farmer or both. *Aimable v. Long & Scott Farms,* 20 F.3d at 444. Similarly, citing the case of *Hodgson v. Griffin and Brand of McAllen, Inc.,* as Congress' expressed intent of the proper criteria in making joint employment determinations, the Eleventh Circuit in *Antenor v. D & S Farms* refused to consider this factor in its analysis of the joint employment issue. *Antenor v. D & S Farms,* 88 F.3d at 931-932. However, the court of appeals in this case chose "to analyze this factor, since it is included in the AWPA's regulations" adopted in 1997 (Pet. App. 17a). As would be expected in all cases involving migrant and seasonal workers, the court of appeals found that picking snap beans is a rote, unskilled task, requiring little training and weighed this factor in favor of finding a joint employer relationship. In utilizing this factor in its analysis, which is included in the DOL's new Rule, the court of appeals considered criteria which are in direct derogation of Congress' intent that the analysis in *Hodgson* be utilized as the appropriate approach in the joint employment determination.

Again, when this factor is utilized in a joint employment analysis under the AWPA, this factor will always weigh against the farmer and in favor of a finding of a joint employment relationship.

E. Whether the Workers' Activities Are an Integral Part of the Farmer's Operation.

Finding that the work performed by the plaintiffs was integral to the Burtons' production and harvesting of their bean crop, the court of appeals determined that this factor weighed in favor of a joint employer relationship (Pet. App. 18a). In the context of the production and harvesting of vegetables, migrant and seasonal workers' picking of the crop will always be integral to the business of the production of the crop. Therefore, this factor will always weigh in favor of a joint employer relationship.

F. Whether the Work Is Performed on the Farmer's Premises.

Finding that the Burtons owned the land upon which the plaintiffs picked the snap bean crop, the court of appeals found that this factor weighed in favor of finding a joint employer relationship (Pet. App. 19a). It is difficult to imagine a circumstance in which migrant or seasonal workers are not harvesting crops on lands that are either owned or leased by the farmer. Again, this factor will always weigh in favor of a joint employer determination.

G. Whether the Farmer Undertook Responsibility Employers Commonly Perform.

The court of appeals recognized that the Burtons did not undertake any responsibilities or perform any functions in relation to the plaintiffs that are commonly performed by employers finding this factor weighing against a determination of a joint employer relationship (Pet. App. 19a-20a).

Utilizing the analysis in *Hodgson v. Griffin and Brand of McAllen, Inc.*, as mandated by Congress in enacting the AWPA and the initial regulations adopted by the DOL, the district court correctly concluded that the Burtons were not the joint employer of the plaintiffs. However, as the forgoing demonstrates, the court of appeals' utilization of the DOL's new Rule will dictate a determination of a joint employer relationship in every case. Under the new Rule, once a farmer sows his seed, his status as a joint employer with the farm labor contractor is preordained. A farmer will always make decisions on when to plant, cultivate and irrigate. The farmer will always make the decision as to the proper time to harvest his crops. A farmer will always check on the progress of the harvest since his very livelihood is dependent on getting his crops to market in a salable condition. A farmer will always decide what part of the crop is ready to be harvested and when to stop the harvest of a field because the crop has become unmarketable. The work of the migrant and seasonal worker will always be found to be a rote, unskilled task, requiring little or no training and the work will always be performed on lands either owned or leased by the farmer. These factors will also always weigh against the farmer and in favor of a joint employer determination. While the incidental factors of the permanency and duration of the relationship and whether the farmer undertakes responsibilities commonly performed by employers may weigh against a finding of joint employment in some cases, these two factors, standing alone, will never overcome the predetermined factors against the farmer under the new DOL Rule.

The district court recognized that to utilize an "economic reality" test as advanced by the plaintiffs would create a strict liability standard by stating, "An economic reality test that sweeps as broad as plaintiffs suggest is no test at all; it is a mere formality" (Pet. App. 48a). In

his law review article finding that the new DOL Rules creates a strict liability standard on farmers, Professor Michael H. LeRoy, of the Institute of Labor and Industrial Relations and College of Law, University of Illinois, noted that the economic reality test, which was advanced by the plaintiffs in this case, was identical to the test advanced under the new DOL Rule. Ironically, writing after the district court's decision and the adoption of the new DOL rule, but prior to the court of appeals' decision in this case, Professor LeRoy stated:

> The same case (*Charles v. Burton*) would have had an opposite result if it had been tried under the new Rule. The broad "economic reality" test advanced by the migrant workers in *Burton* is identical to the Rule's test. On *Burton's* facts, however, it would be manifestly unjust to hold the farmers liable for a car accident they could not have prevented. Michael H. LeRoy, *Farm Labor Contractors and Agricultural Producers as Joint Employers Under the Migrant and Seasonal Agricultural Worker Protection Act: An Empirical Public Policy Analysis,* 19 Berkley J. Employment & Lab. L. at 213.

Professor LeRoy determined that the new Rule, as applied in *Burton*, loses the flexibility the courts have brought to the cases under the AWPA, flexibility that Congress intended when it enacted the AWPA. Despite the strong opposition and valid concerns voiced by the opponents of the new Rule, "the DOL did not craft the Rule to accommodate the perceived problems. *It retained a strict liability standard* while maintaining it was not doing so, apparently because it believed the federal courts would not enforce the MSPA (AWPA) properly without it." Michael H. LeRoy, *Farm Labor Contractors and Agricultural Producers as Joint Employers Under the Migrant and Seasonal Agricultural Worker Protection Act: An Empirical Public Analysis,* 19 Berkley J. Employment & Lab. L. at 195, 213. (Emphasis supplied).

Based upon the foregoing, it is clear that the new DOL Rule, as applied by the court of appeals in this case, creates a strict liability standard on farmers who utilize the services of a farm labor contractor in that a joint employer determination will be made in all cases. The legislative history of the AWPA provides the appropriate analysis to be applied in the joint employer determination and it is clear that Congress did not intend that a joint employer relationship be found in every case. The new DOL Rule and the court of appeal's decision in this case are in derogation of congressional intent. Based upon the foregoing, this Court must define the correct analysis to be utilized in the joint employment determination which is consistent with Congress' intent in enacting the AWPA.

II. THE COURT OF APPEALS' DECISION IS IN CONTRAVENTION OF OTHER PANEL DECISIONS OF THE ELEVENTH CIRCUIT IN *AIMABLE v. LONG & SCOTT FARMS* AND *ANTENOR v. D & S FARMS.*

The court of appeals concluded that the Burtons exercised some degree of control over the plaintiffs by determining the particular fields ready to harvest, and by supplying the plaintiffs with boxes. Considering the farmer's decisions in the production of his crops to evidence control constitutes a drastic departure from the Eleventh Circuit's previous decisions in *Aimable v. Long & Scott Farms*, 20 F.3d 434 (11th Cir. 1994), and *Antenor v. D & S Farms*, 88 F.3d 925 (11th Cir. 1996) which limited the inquiry of control to specific indicia of control. This conflict between these decisions was succinctly brought to light in Senior Circuit Judge Roney's dissenting opinion (Pet. App. 26a). Both the *Aimable* and *Antenor* courts recognized that agricultural decisions regarding which crops to plant, how much to plant, how to grow the crop, which parcels of land to harvest, when in the season to begin the harvest, and how frequently the

field should be harvested cannot be likened to "control" in the AWPA sense. The *Aimable* court found it unsurprising that the grower would give general instructions to the farm labor contractor as to which crops to harvest at a particular time and such instructions do not evidence control within the meaning of the AWPA. To find control sufficient to evidence a joint employer relationship, the *Aimable* court stated: "Control arises, we believe, when the farmer goes beyond general instructions, such as how many acres to pick in a given day, and begins to assign specific tasks, to assign specific workers, or to take an overly active role in the oversight of the work." *Aimable v. Long & Scott Farms*, 20 F.3d at 441. Following the decision in *Aimable v. Long & Scott Farms,* the Eleventh Circuit in *Antenor v. D & S Farms* also required specific indicia of control to support a finding of a joint employer relationship, holding that abstract notions of control arising out of general agricultural decisions of the farmer insufficient. In *Antenor,* the Eleventh Circuit stated: "Such control arises when a grower determines . . . the number of workers hired for a job, when work should begin on a particular day, which workers should be assigned to particular tasks, and whether a worker should be disciplined or retained." *Antenor v. D & S Farms*, 88 F.3d at 933.

In this case, the court of appeals found no specific indicia of control by the Burtons but used their agricultural decisions in determining which field was ready to harvest and directing Luxama to the appropriate field to evidence control over the workers. Therefore, as Judge Roney noted in his dissent, the court of appeals' decisions in this case is in direct contravention to the Eleventh Circuit's prior rulings in *Aimable* and *Antenor* (Pet. App. 28a).

The court of appeals' holding that the Burtons' monitoring the progress of the harvest is sufficient to support a

finding of supervision over the workers is also in contravention of the Eleventh Circuit's prior decisions in *Aimable* and *Antenor*. As Justice Roney wrote in his dissenting opinion, while the Burtons directed Luxama to the appropriate field for harvesting, "the Burtons did not direct the work of the harvest or supervise the plaintiffs in the field. Monitoring the harvest several times a day is akin to the 'infrequent assertions of minimal oversight' discussed in *Aimable*" (Pet. App. 29a). In *Aimable*, there was evidence that the employers, on occasion, provided direction to the pickers and occasionally gave the farm labor contractor demands that were relayed to the workers. *Aimable v. Long & Scott Farms*, 20 F.3d at 441, 442. In this case, the Burtons did not direct, even occasionally, the work of the plaintiffs, directly or through the farm labor contractor, Wilner Luxama. The regular monitoring of the progress of the harvest by the Burtons is less than the degree of supervision the Eleventh Circuit in *Aimable* held to be insufficient to demonstrate a degree of supervision to show joint employer status. The court of appeals' decision in this case is in direct contravention to the holding in *Aimable*. Even the new DOL Rule recognizes the necessity of a reasonable degree of oversight to ensure compliance of the contract by the farm labor contractor. 29 C.F.R. § 500.20(h)(5)(iv)(A) (1997).[4] Therefore, not only is the holding by the court of appeals in this case in direct conflict with the holding in *Aimable v. Long & Scott Farms*, it is in direct conflict with the Code of Federal Regulations.

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[4] 29 C.F.R. § 500.20(h)(5)(iv)(A) (1997) provides; whether the agricultural employer/association has the power, either alone or through control of the farm labor contractor to direct, control, or supervise the worker(s) or the work performed (such control may be either direct or indirect, taking into account the nature of the work performed and a reasonable degree of contract performance oversight and coordination with third parties.)

The court of appeals' considerations in determining the Burtons' power to hire, fire, modify the employment conditions, pay rate or methods of payment also conflicts with and contravenes the Eleventh Circuit's decision in *Aimable v. Long & Scott Farms.* As Justice Roney pointed out in his dissenting opinion, the relevant considerations regarding an analysis of this factor is who controlled the pay rates, determined how the workers received their pay and when payment was made (Pet. App. 29a). In its majority opinion, the court of appeals acknowledged that the Burtons "did not determine whether a specific worker should be disciplined . . . did not enjoy a 'veto' power over Luxama's hiring decisions . . . In fact, Luxama controlled their pay rates, determined how they received their pay and when they received payment" (Pet. App. 12a, 14a, 15a). These factual findings by the court of appeals would demand a determination that the Burtons did not have the power, either directly or indirectly, to hire, fire, modify the employment conditions or determine the pay rates or the method of wage payment for the plaintiffs. As in its analysis of the other factors discussed above, the court of appeals' decision in this case cannot be reconciled with the decisions in *Aimable v. Long & Scott Farms* and *Antenor v. D & S Farms.*

The court of appeals refused an en banc rehearing to reconcile the obvious conflicts in its decision in this case and its previous rulings in *Aimable* and *Antenor.* The conflict between these Eleventh Circuit decisions prohibit a consistent analysis of the joint employer determination and creates great uncertainty within the regulated community concerning what are the appropriate considerations in the joint employer analysis. This Court should reconcile these conflicts and give guidance to the lower courts and the regulated community as to the appropriate factual considerations in the joint employer determination.

III. THE ELEVENTH CIRCUIT'S DECISION IMPOSES STRICT LIABILITY ON PERSONS WHO FAIL TO VERIFY THE CERTIFICATE OF REGISTRATION OF A FARM LABOR CONTRACTOR FOR BREACH OF DUTIES IMPOSED BY THE AWPA ONLY UPON AGRICULTURAL EMPLOYERS, CONTRARY TO CONGRESSIONAL INTENT.

From a reading of the AWPA and the legislative history, it is evident that Congress intended to place the burden and responsibility of achieving the goals of the legislation upon agricultural employers and agricultural associations directly involved in the working conditions, payment, housing and transportation of migrant and seasonal workers. In the area of transportation safety, Congress specifically places the burden upon agricultural employers and agricultural associations to ensure that the vehicles transporting migrant and seasonal workers comply with federal and state safety standards and that any vehicle used to transport migrant or seasonal workers is adequately insured. 29 U.S.C. § 1841.

The legislative history surrounding the enactment of the AWPA demonstrates Congress' intent to impose liability for violations of certain provisions of the Act based upon the employer-employee relationship. In discussing the term "employ" the Committee explained that the reason for an expansive definition to include "joint employer" relationships was to place duties upon agricultural employers and agricultural associations and to attach liability for a breach thereof. The Committee stated:

> The Committee's use of this term was deliberate and done with the clear intent of adopting the "joint employer" doctrine as a central foundation of this new statute; it is the indivisible hinge *between certain important duties imposed for the protection of migrant and seasonal workers and those liable for any breach of those duties. The determination of whether a farm labor contractor, agricultural employer or agricul-*

> *tural association has certain duties under this act will turn on whether such person is an employer of migrant or seasonal agricultural workers.* H.R. Rep. No. 885, 97th Cong., 2nd Sess. (1982); reprinted in 1982 U.S.C.C.A.N. 4547, 4552. (Emphasis added).

In this case, the plaintiffs seek to impose the liabilities of an agricultural employer on the Burtons through a violation of 29 U.S.C. § 1842, a non-agricultural employer statute. However, it is clear that Congress did not intend to impose the liabilities attendant with an employer's breach of duty imposed by 29 U.S.C. § 1841 to a non-employer through a violation of 29 U.S.C. § 1842. Congress did not intend to impose strict liability upon "any person" who utilizes the services of a farm labor contractor for a violation of the motor vehicle safety provision found in 29 U.S.C. § 1841, and the court of appeals' ruling runs contrary to the Congressional statutory scheme. Not being the employers of the workers, the Burtons did not have the duties imposed under 29 U.S.C. § 1841 and, therefore, cannot be held liable in damages for a breach of those duties. The ruling of the district court is consistent with the legislative intent that only those persons who are employers of farmworkers be held liable for actual damages arising out of the breach of duties imposed on agricultural employers by the AWPA.

The district court also determined that the Burtons' failure to check Luxama's certificate of registration was "simply too far removed from the type of harm complained of for actual damages to be attributable to defendants." Citing *Ricketts v. Vann*, 861 F. Supp. 404, 406 (E.D. N.C. 1993) *aff'd on other grounds*, 32 F.3d 71 (4th Cir. 1994), the district court held that to recover actual damages the plaintiff must show that a particular violation of the AWPA was the proximate cause of the damages suffered (R4-130-3). The court determined that nothing in the legislative history of the AWPA suggested that a rule of strict liability be imposed to achieve the

purposes of the Act and that by the use of the term "actual" damages Congress intended that there be a causal requirement between a particular violation and the type and measure of damages recoverable (R4-130-4).

The district court's ruling is an accurate application of the law in the state of Georgia to the facts of this case. The governing statute in Georgia as to when damages are recoverable is O.C.G.A. § 51-12-9 that states:

> Damages which are the legal and natural result of the act done, though contingent to some extent, are not too remote to be recovered. However, damages traceable to the act, but which are not its legal and natural consequences, are too remote and contingent to be recovered.

In the case sub judice, while the Burtons' failure to verify that Luxama possessed a valid certificate of registration may be traceable to Plaintiffs' damages, the lack of insurance to cover medical care and lost wages are not the legal and natural consequences of the act. It cannot be said that a person of ordinary caution and prudence could reasonably have foreseen that a failure to verify a certificate of registration would result in an unfortunate accident while the workers were on their way to fields or that the farm labor contractor would have not have carried the necessary insurance on the vehicle. It is notable that no court has authorized the recovery of actual damages for a violation of 29 U.S.C. § 1842 and have determined that such a violation is not egregious, is only a technical violation and have awarded less than the maximum amount of $500.00 as statutory damages. See *Saintida v. Tyre*, 783 F. Supp. 1368, 1375 (S.D. Fla. 1992) (violation of 29 U.S.C. § 1842 is not egregious and does not warrant maximum statutory award, $100.00 as to each plaintiff); *Frenel v. Freezeland Orchard Company, Inc.*, 108 Lab. Cas. P 35,016 (E.D. Va. 1987) (award of $100.00 per plaintiff).

Further 29 U.S.C. § 1854(c) gives discretion to the trial court to award actual or statutory damages. In this case, while the court found the Burtons' violation was technically intentional, "the violations were not a knowing, willful and flagrant disregard of the law" and that it was reasonable for the Burtons to assume that Luxama was a qualified farm labor contractor since Luxama had been referred to the Burtons by the State Department of Labor (R4-159). To hold that the Burtons are liable for Plaintiffs' actual damages as a matter of law, disregards Congress' intent that the district courts have discretion to determine an appropriate award of damages in each case based upon the nature of the violation. To allow actual damages to be assessed in some cases for a violation of 29 U.S.C. § 1842 and the assessment of statutory damages in other cases, would "create anomalous results Congress could not have intended" and which would not be necessary "to accomplish Congress' general purpose to encourage effective enforcement". *Alvarez v. Longboy*, 697 F.2d 1333, 1339 (9th Cir. 1983).

CONCLUSION

For these reasons, and upon the entire record herein, Petitioners respectfully submit this Court should issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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